

AO 120 (Rev. 2/99)

<b>TO: Mail Stop 8</b> <b>Director of the U.S. Patent &amp; Trademark Office</b> <b>P.O. Box 1450</b> <b>Alexandria, VA 22313-1450</b>	<b>REPORT ON THE</b> <b>FILING OR DETERMINATION OF AN</b> <b>ACTION REGARDING A PATENT OR</b> <b>TRADEMARK</b>
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In Compliance with 35 § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been  
 filed in the U.S. District Court Northern District of California on the following ☒ Patents or ☐ Trademarks:

DOCKET NO. <b>CV 11-03955 DMR</b>	DATE FILED 8/11/2011	U.S. DISTRICT COURT Oakland Division, 1301 Clay Street, Suite 400S, Oakland, CA 94612
PLAINTIFF <b>TESSENDERLO KERLEY INC</b>		DEFENDANT <b>D &amp; M CHEM INC</b>
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 *See attached complaint		
2 6,110,867		
3 6,464,995		
4		
5		

In the above—entitled case, the following patent(s) have been included:

DATE INCLUDED	INCLUDED BY <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading		
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK	
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In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT
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CLERK Richard W. Wieking	(BY) DEPUTY CLERK Valerie Kyono	DATE August 16, 2011
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Copy 1—Upon initiation of action, mail this copy to Commissioner    Copy 3—Upon termination of action, mail this copy to Commissioner  
 Copy 2—Upon filing document adding patent(s), mail this copy to Commissioner    Copy 4—Case file copy

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21  
22 **UNITED STATES DISTRICT COURT FOR THE**  
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24 **NORTHERN DISTRICT OF CALIFORNIA**

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148 TESSENDERLO KERLEY, INC., a  
149 Delaware corporation,

150 Plaintiff,

151 v.

152 D & M CHEM, INC., a Washington  
153 corporation,

154 Defendant.

CV

11 3955  
Case No.

COMPLAINT FOR  
PATENT INFRINGEMENT

DEMAND FOR JURY TRIAL

1 Plaintiff Tessengerlo Kerley, Inc. ("TKI"), by and through its undersigned attorneys, files  
2 this Complaint against defendant D & M Chem, Inc. ("D&M Chem"). In support of its claims,  
3 TKI states as follows:

4 **PARTIES**

5 1. TKI is a Delaware corporation having its principal place of business at 2255  
6 North 44th Street, Phoenix, Arizona 85008.

7 2. Upon information and belief, defendant D&M Chem is a Washington  
8 corporation, having a place of business at 112 Charron Road, Moxee, Washington 98936.

9 3. Defendant D&M Chem markets and distributes crop protectants throughout the  
10 United States including in the state of California, in direct competition with TKI.

11 **JURISDICTION AND VENUE**

12 4. This is an action for patent infringement arising under the Patent Act.

13 5. This Court has subject matter jurisdiction over this action under 28 U.S.C. §  
14 1338(a), which confers jurisdiction over cases of patent infringement, and under 28 U.S.C. §  
15 1331, which confers federal question jurisdiction in general.

16 6. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.

17 **INTRADISTRICT ASSIGNMENT**

18 7. This is an Intellectual Property Action to be assigned on a district-wide basis  
19 pursuant to Civil Local Rule 3-2(c).

20 **NATURE OF THE ACTION**

21 8. This action is brought under the Patent Act, 35 U.S.C. § 271 *et seq.*

22 9. TKI seeks injunctive and compensatory damages for D&M Chem's willful  
23 infringement of TKI's United States Patent Nos. 6,110,867 ("the '867 patent") and 6,464,995  
24 ("the '995 patent").

25 10. TKI and D&M Chem are direct competitors in the market for the manufacture  
26 and sale of crop protectants.

27 11. D&M Chem's patent infringement has resulted in substantial harm to TKI in  
28 the form of lost sales and lost profits. Injunctive relief from this Court is necessary to prevent

1 further harm to TKI.

## 2 **BACKGROUND**

### 3 **TKI's Patents**

4 12. The '867 patent, entitled "Method for Providing Enhanced Photosynthesis,"  
5 issued on August 29, 2000 in the name of inventors David Michael Glenn, Dennis G.  
6 Sekutowski, and Gary J. Puterka. TKI enjoys all exclusive rights and privileges with respect  
7 to the '867 patent in the United States, including the right to enforce the '867 patent in its  
8 own name. A copy of the '867 patent is attached hereto as Exhibit 1.

9 13. The '867 patent was the subject of reexamination proceedings, Application  
10 Serial No. 90/006,658, before the United States Patent and Trademark Office ("USPTO"). A  
11 reexamination certificate was issued by the USPTO on March 7, 2006.

12 14. The subject matter of the '867 patent relates to a method for enhancing  
13 photosynthesis of a horticultural crop by increasing carbon dioxide assimilation of said  
14 horticultural crop which comprises applying to the surface of said horticultural crop an  
15 effective amount of one or more highly reflective particulate materials, said particulate  
16 materials being finely divided, and wherein the particles as applied allow for the exchange of  
17 gases on the surface of said crop and the finely divided particulate materials have a median  
18 individual particle size below about 3 microns.

19 15. The '995 patent, entitled "Treated Horticultural Substrates," issued on October  
20 15, 2002 in the name of inventors Dennis G. Sekutowski, and Gary J. Puterka, and David  
21 Michael Glenn. TKI enjoys all exclusive rights and privileges with respect to the '995 patent  
22 in the United States, including the right to enforce the '995 patent in its own name. A copy  
23 of the '995 patent is attached hereto as Exhibit 2.

24 16. The subject matter of the '995 patent relates to a method for enhancing the  
25 horticultural effect of horticultural substrates selected from the group consisting of fruits,  
26 vegetables, trees, flowers, grasses, roots, and landscape and ornamental plants which  
27 comprises applying a slurry comprising water, a surfactant, and one or more particulate  
28 materials, selected from the group consisting of calcium carbonate, hydrous kaolin, calcined

1 kaolin and mixtures thereof, to the surface of said substrate to form a membrane comprised  
2 of one or more particulate layers and the surfactant, said layers comprising one or more  
3 particulate materials, said particulate materials being finely divided, and wherein said  
4 membrane allows for the exchange of gases on the surface of said substrate.

#### 5 **Crop Protectant Products**

6 17. TKI manufactures and sells a kaolin-based crop protectant product under the  
7 brand name Surround<sup>®</sup>, for use as a broad spectrum agricultural crop protectant for  
8 controlling damage from various physiological disorders such as sunburn and heat stress as  
9 well as a growth enhancer. Exhibit 3 (Surround label). TKI has the right to exclude from the  
10 marketplace any competing product for which its application infringes at least claim 1 of the  
11 '867 patent and/or claim 23 of the '995 patent.

12 18. The Eclipse<sup>®</sup> crop protectant product has been distributed by defendant D&M  
13 Chem. *See* Exhibit 4 (D&M Eclipse brochure).

14 19. The Eclipse product was also distributed by a third-party Novazone, Inc.  
15 ("Novazone"), which has since changed its corporate name to Purfresh, Inc. ("Purfresh"). *See*  
16 Exhibit 5 (Novazone Eclipse brochure). Purfresh is a Delaware corporation, having a place of  
17 business in this judicial district at 47211 Bayside Parkway, Fremont, California 94538. On  
18 information and belief, Purfresh obtained the Eclipse product from D&M Chem.

#### 19 **D&M Chem's Infringement of TKI's Patents**

20 20. Upon information and belief, application of the Eclipse product infringes at  
21 least claim 1 of the '867 patent and claim 23 of the '995 patent.

22 21. D&M Chem's promotional literature for the Eclipse product describes it as: (1)  
23 a calcium carbonate and boron liquid suspension having submicron particles; (2) effective in  
24 preventing and/or reducing sunburn and heat stress; and (3) increasing color, the integrity of  
25 cell structure, and reducing physiological problems of crops. *See* Exhibit 4.

26 22. Novazone's promotional literature for the Eclipse product describes it as: (1) a  
27 calcium carbonate and boron colloidal liquid having submicron particles; (2) effective in the  
28 control of sunburn and lessening the effects of heat stress; and (3) enabling natural and better

1 coloring and photosynthesis as well as providing higher pack-outs, larger produce, and  
2 earlier harvest dates. *See* Exhibit 5.

3 **COUNT I**

4 **Infringement of U.S. Patent No. 6,110,867**

5 23. Paragraphs 1 through 22 of the complaint are incorporated by reference as  
6 though fully set forth herein.

7 24. All claims of the '867 patent are presumed valid and enforceable.

8 25. On information and belief, defendant D&M Chem has contributorily infringed  
9 and/or actively induced the infringement under 35 U.S.C. § 271, and continues to  
10 contributorily infringe and/or actively induce the infringement under 35 U.S.C. § 271, of at  
11 least claim 1 of the '867 patent by (1) making, having made, selling, and/or offering for sale,  
12 (2) authorizing others to make, have made, sell, and/or offer for sale, and/or (3) causing  
13 others to use the Eclipse product.

14 26. Defendant D&M Chem's infringement has been committed with knowledge of  
15 the '867 patent and has been intentional, willful and deliberate.

16 27. As a result of defendant D&M Chem's infringement of the '867 patent, TKI  
17 has been damaged and will be further damaged, and is entitled to be compensated for such  
18 damages, pursuant to 35 U.S.C. § 284, in an amount to be determined at trial.

19 28. As a result of defendant D&M Chem's infringement of the '867 patent, TKI  
20 has suffered and will continue to suffer irreparable harm, for which TKI has no adequate  
21 remedy at law, unless the Court enjoins such infringing activities pursuant to 35 U.S.C. §  
22 283.

23 **COUNT II**

24 **Infringement of U.S. Patent No. 6,464,995**

25 29. Paragraphs 1 through 28 of the complaint are incorporated by reference as  
26 though fully set forth herein.

27 30. All claims of the '995 patent are presumed valid and enforceable.

28 31. On information and belief, defendant D&M Chem has contributorily infringed

1 and/or actively induced the infringement under 35 U.S.C. § 271, and continues to  
2 contributorily infringe and/or actively induce the infringement under 35 U.S.C. § 271, of at  
3 least claim 23 of the '995 patent by (1) making, having made, selling, and/or offering for  
4 sale, (2) authorizing others to make, have made, sell, and/or offer for sale, and/or (3) causing  
5 others to use the Eclipse product.

6 32. Defendant D&M Chem's infringement has been committed with knowledge of  
7 the '995 patent and has been intentional, willful and deliberate.

8 33. As a result of defendant D&M Chem's infringement of the '995 patent, TKI  
9 has been damaged and will be further damaged, and is entitled to be compensated for such  
10 damages, pursuant to 35 U.S.C. § 284, in an amount to be determined at trial.

11 34. As a result of defendant D&M Chem's infringement of the '995 patent, TKI  
12 has suffered and will continue to suffer irreparable harm, for which TKI has no adequate  
13 remedy at law, unless the Court enjoins such infringing activities pursuant to 35 U.S.C. §  
14 283.

15 **REQUEST FOR RELIEF**

16 WHEREFORE, TKI respectfully requests that this Court enter a Judgment and Order  
17 in its favor and against defendant D&M Chem as follows:

18 (a) A judgment that defendant D&M Chem has contributed to and/or actively  
19 induced the infringement of the '867 patent by (i) making, having made, selling, and/or  
20 offering for sale, (ii) authorizing others to make, have made, sell, and/or offer for sale, and/or  
21 (iii) causing others to use the Eclipse product in the United States;

22 (b) A judgment that defendant D&M Chem has contributed to and/or actively  
23 induced the infringement of the '995 patent by (i) making, having made, selling, and/or  
24 offering for sale, (ii) authorizing others to make, have made, sell, and/or offer for sale, and/or  
25 (iii) causing others to use the Eclipse product in the United States;

26 (c) A judgment and order permanently enjoining defendant D&M Chem from  
27 further infringing the '867 patent by (i) making, having made, selling, and/or offering for  
28 sale, (ii) authorizing others to make, have made, sell, and/or offer for sale, and/or (iii)

1 causing others to use the Eclipse product in the United States;

2 (d) A judgment and order permanently enjoining defendant D&M Chem from  
3 further infringing the '995 patent by (i) making, having made, selling, and/or offering for  
4 sale, (ii) authorizing others to make, have made, sell, and/or offer for sale, and/or (iii)  
5 causing others to use the Eclipse product in the United States;

6 (e) A judgment and order requiring defendant D&M Chem to pay all available and  
7 legally permissible damages to compensate TKI for defendant's infringing acts, but in no  
8 event less than a reasonable royalty in accordance with 35 U.S.C. § 284;

9 (f) A finding that defendant's conduct has been willful, warranting an award of  
10 treble damages under 35 U.S.C. § 284;

11 (g) A finding that this case is exceptional under 35 U.S.C. § 285, warranting an  
12 award to TKI of its costs, including attorney fees, and other expenses incurred in connection  
13 with this action;

14 (h) A judgment and order requiring that the defendant pay TKI pre-judgment  
15 interest and post-judgment interest on all damages awarded;

16 (i) Such further relief as this Court deems just and appropriate.

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**JURY DEMAND**

TKI demands a trial by jury on all issues so triable.

STEPTOE & JOHNSON LLP

Dated: August 10, 2011

By: 

Daniel R. Blakey (State Bar No. 143748)  
Seth A. Watkins (*pro hac vice* pending)  
Timothy C. Bickham (*pro hac vice* pending)  
Houda Morad (*pro hac vice* pending)

Attorneys for Plaintiff  
TESSENDERLO KERLEY, INC.